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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1063

SOUTHWIRE COMPANY
AND
ROY RICHARDS,

Petitioners

versus

NATIONAL LABOR RELATIONS BOARD

Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRANK M. SWIFT
2000 Atlanta Gas Light Tower
235 Peachtree Street, N.E.
Atlanta, Georgia 30303
Counsel for Petitioners

OF COUNSEL:
SWIFT, CURRIE, McGHEE & HIERS
2000 Atlanta Gas Light Tower
235 Peachtree Street, N.E.
Atlanta, Georgia 30303

INDEX

	Page
Order of Reference	1
Prehearing Conference before Special Master, June 7, 1968	6
Order Denying Petitioner's Request for Official Notice	24
Order Denying Motion for Reconsideration of Order Denying Petitioner's Request for Official Notice	30
Report of Special Master	34
Opinion of Fifth Circuit Court of Appeals, July 27, 1970	53
Judgment in Contempt	67
Order Denying Petition for Rehearing and Petition for Rehearing En Banc, October 28, 1970	70

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 20,608 and 21,784

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

SOUTHWIRE COMPANY AND ROY RICHARDS,
Respondents.

ORDER OF REFERENCE

Before Tuttle, Bell, Coleman, Circuit Judges.

BY THE COURT:—

The National Labor Relations Board having filed its petition praying *inter alia* that Southwire Company and Roy Richards, be adjudged in civil contempt of this Court for failing and refusing to comply with two decrees of this Court entered herein on April 29, 1963 and November 23, 1965; and respondents having joined issue, the Court now finds that it is appropriate to designate a Special Master to determine the issues of fact and law raised by the respective pleadings, it is

ORDERED that WILLIAM K. JACKSON, Esquire,

Hearing Examiner, United States Civil Service Commission be, and he hereby is, appointed Special Master to take testimony and receive evidence with respect to the issues raised by the pleadings in this case; that the Clerk shall forthwith furnish the Master with a copy of this order, upon receipt of which the Master shall take an oath, faithfully to perform the duties imposed by this order, and file a copy of such oath with the Clerk of this Court; and it is

FURTHER ORDERED THAT THE MASTER shall have authority, powers and duties, as follows:

(a) To conduct such pre-trial proceedings as may be appropriate to consider the simplification of the issues herein; the possibility of obtaining admission of facts and of documents; and to conduct or authorize all other matters which may aid in the disposition of the reference, including the entertainment of and disposition of motions for discovery and motions to amend or supplement the pleadings.

(b) With all reasonable diligence, to hold such hearings as may be reasonably necessary to obtain the relevant and admissible oral or documentary evidence from witnesses made available by the parties, or under the compelling process of the Master, at Carrollton, Georgia, and or at such other place or places as the Master may deem necessary or advantageous in obtaining said testimony and accommodating witnesses and parties.

(c) To engage a qualified reporter to take and transcribe the testimony adduced at such hearings, each side to pay one-half of the reporter's charges upon the order of the Master.

(d) In accordance with the Federal Rules of Civil Procedure to regulate all proceedings in the hearings before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under this order. He may require the production before him of admissible evidence upon all matters relevant and material to the issues, including the production of all books, papers, vouchers, documents and writings. Upon request of the parties, he may issue subpoenas for witnesses, who shall be paid witness fees and mileage pursuant to the law applicable to witnesses in the courts of the United States. If, without adequate excuse, a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties and remedies provided therefor. The Master may rule upon the admissibility of evidence, subject to review by this Court upon his report. He may put witnesses on oath and may himself examine them. At the request of either party, he shall make a record of evidence offered and excluded, for review by this Court upon his report.

(e) To conduct the hearings with the design and purpose of keeping the inquiry within reasonable bounds confined to the controlling issues in these cases. If an objection to a question propounded to a witness is sustained by the Master, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The Master may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The Master shall take and report the evidence in full, unless it appears that

the evidence is not admissible on any ground or that the witness is privileged.

(f) With all reasonable speed after the conclusion of the hearings, to file with the Clerk of the Court the transcript of the proceedings and of the evidence, and the original exhibits, together with the Master's report thereon and his recommendations as to findings of fact and recommendations as to conclusions of law; a copy of said report and recommendations shall at the same time be served upon the parties. The master's report and recommended findings and conclusions shall be binding upon this Court only in the manner and to the extent the Court deems appropriate. The Master may require the parties to submit, prior to the filing of his report, proposed findings, objections to proposed findings, and briefs.

(g) The compensation and expenses of the Master are to be paid in the first instance by the Board; but final assessment and allocation of all costs, fees and expenses, including the cost of a reporter, are reserved for further order of the Court.

IT IS HEREBY FURTHER ORDERED that upon the filing with the Clerk of the Court of the Master's report and recommendations, the transcript of the proceedings and the original exhibits, the Clerk shall forthwith mail to all parties notice thereof. Either side may file written objections to the Master's report and recommendaions but such objections must be filed with the Court and served upon the other side within twenty (20) days after notice of the report. If only one side files objections to the Master's report, that side shall serve and

file its brief in support of its objections within forty-five (45) days after filing of the Master's report. If both sides file objections, then the Board shall serve and file the opening brief within the same period of time. The other side shall file and serve its answering brief within twenty (20) days after filing of the opening brief, and a reply brief may be filed within ten (10) days after filing of the answering brief. The Court will then consider any requests for oral argument.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 20,608 and 21,784

In the Matter of:
NATIONAL LABOR RELATIONS BOARD
and
SOUTHWIRE COMPANY AND ROY RICHARDS

Hearingroom,
1101 11th Street,
Washington, D. C.
Friday, June 7th, 1968

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock, a.m.

BEFORE:

WILLIAM K. JACKSON, Special Master

APPEARANCES:

ROBERT S. HILLMAN, Esq.,
ROBERT M. LIEBER, Esq.,
Room 937, 1717 Pennsylvania Avenue, NW, Washington, D. C., appearing on behalf of Counsel for the General Counsel, Petitioner.

FRANK M. SWIFT, Esq.,
DAVID M. VAUGHAN, Esq.,
JOHN PAUL JONES, Esq.,
ROBERT A. BROWN
1614 Fulton National Bank Building, Atlanta, Georgia 30303, appearing on behalf of the Respondent.

PROCEEDINGS

SPECIAL MASTER JACKSON: The prehearing conference will come to order.

This is a prehearing conference set by the Special Master pursuant to his order of May 16, 1968 in the above captioned matter. The pre-trial conference was called for the purposes set forth and enumerated in the Special Master's order.

Now, the Special Master will proceed at the convenience and at the will of the parties. I will not select where to start, but I will let Mr. Hillman or Mr. Swift. First, if you want to make an informal statement, either side, I will be glad to listen to that. I am totally ignorant of anything about this case. From this point on I expect to be educated. Anything you would like to say at this point, a preliminary statement by either party, I will be willing to listen to.

MR. SWIFT: If I may, just a word. It may not throw a great deal of light on the problem, except, as you say, this being new to you, I might say that it appears to me and to all of us to be a complicated and protracted affair. There are 47 allegations of actions that constitute contempt. We have in affect admitted having done a few of these things in our answer. But we state that as a matter of law they were proper and that they did not constitute contempt.

We have been talking together, the gentleman from the Board with one or more of us from time to time. And we anticipate it is going to be a rather lengthy trial. We are going to have it in Carrollton, Georgia.

I might mention, really, I am not helping you a great deal. We do not even have an air conditioned court house, and a Georgia court house in the summer is bound to be unbearably hot. There is a new Holiday Inn about eight miles away. I think life will be a little more bearable after dark.

SPECIAL MASTER: If the parties want to so agree, I would be willing to sit in the Holiday Inn if they have a meeting room. I have done this in cases that I have heard before the Federal Trade Commission. I have met in the motel if they have a meeting room, which most of these Holiday Inns do. If it is convenient to both parties, you can make whatever agreement with the Holiday Inn you want for the use of that room. That is up to you. I would be willing to sit anywhere that is convenient to you people.

MR. SWIFT: That is an interesting suggestion, sir. Why don't we, Mr. Hillman and Bob, pursue this and see what they may have in facilities. I believe normally they do have some sort of conference room for sales meetings and things like that. Maybe we can have a part of that. And then if we get into the matter of a press for witnesses, we will be right in the community of Carrollton so that they can up from the plant. Maybe we can shift back and forth.

SPECIAL MASTER: That would be agreeable.

MR. SWIFT: Now, I am planting the seed, if I may put it this way, that, with the complexity of this particular matter, that, at least speaking from the respondent's view, we would be appreciative if at the end of the

Board's case, if maybe there might be a 10 day recess, or for some period reasonable to that, so that we can try to get to gether and see where we are. Maybe it might simplify our case.

SPECIAL MASTER: I would listen to any request with a reasonable attitude. Any space of time you feel might be helpful and would probably prove to shorten these hearings in the end, to shorten this proceeding —

MR. SWIFT: I believe it would.

SPECIAL MASTER: I would have an open mind and grant such request as a court would.

MR. SWIFT: You are going to see in a little while, when we present witnesses, we have over a hundred names on the list. We would ask to reserve the right, of course, as the case may unfold, because we don't know in truth what some will say. We do not want to tie our hands by saying certain witnesses will be called.

SPECIAL MASTER: I would be liberal in allowing you to amend where a witness is called for amendment or impeachment. As I said before with regard to documents, I will follow the same pattern as witnesses. Those called for rebuttal or impeachment, I am greatly aware at this point you will not be able to predict what you would need in that regard. So, I will permit you to add names for that purpose.

MR. SWIFT: We could guess, of course, on some.

SPECIAL MASTER: But I say I will be reasonable in allowing you to add for that purpose.

MR. SWIFT: Well, I think with these few remarks maybe I might as well sit down. Maybe Mr. Hillman has something and we can get into the business of the day.

MR. HILLMAN: I have just a few remarks about the pretrial memorandum and how it was prepared, which I think may be helpful. Perhaps if we both serve you with a copy of our pre-trial memorandum now —

SPECIAL MASTER: Let me interject this on copies. I would like, on all papers, for you to do this for me; if you do not have it now, you can supplement it. We are going to need an original document of what you are submitting to go into the docket files, so to speak, so that (1) there will be a complete file of papers to go down to the court; (2) I would need for my personal reading files a copy for myself, which I will scribble on and so forth. And so, at least an original and one copy of everything that you are giving me. At a later date you can supplement. From here on out, a minimum of two copies, because I want to have one complete file for the court.

MR. SWIFT: That is understood, sir.

MR. HILLMAN: Here you are, sir.

SPECIAL MASTER: Now, if you will, read into the record what you are submitting me.

MR. HILLMAN: I have just submitted to the Special Master an original and one copy of the Pre-Trial Memorandum of the National Labor Relations Board, which includes in it several sections, which I will explain in a

moment, which were drawn up jointly by the Board and the Southwire Company.

In addition, I hand you two sections of the Pre-Trial Memorandum from the company. I believe a list of documents and a list of witnesses which the company has prepared.

In almost all sections of both pre-trial memorandums, we exchanged this information informally before this date in conferences. And as I said, each of them have been drawn up jointly.

If I can flip through this together with you just briefly, on Page 2 of our Pre-Trial memorandum you see a short list of documents and exhibits. And the company has submitted some longer lists of documents and exhibits.

SPECIAL MASTER: Let me at this point, if I may, interrupt. How do we number exhibits? Let us settle this right now.

MR. HILLMAN: I would think we would just number them Petitioner's Exhibit 1, 2, consecutively, and respondent's 1, 2, 3, consecutively.

Will we have any joint exhibits?

MR. SWIFT: I don't think so.

SPECIAL MASTER: Is that all right with you?

MR. SWIFT: No objection at all.

SPECIAL MASTER: Let me say this; where an ex-

hibit is more than one page, how would you number it?

MR. HILLMAN: 1(a), (b), (c), (d).

SPECIAL MASTER: There is nothing over 26 pages?

MR. HILLMAN: Not that I know.

MR. SWIFT: The only thing would be the employee handbook. That is a bound book.

SPECIAL MASTER: We will leave that without renumbering the individual pages, just Exhibit 6(a). But on pages, when you some to put in your exhibits at the hearing, I want them all numbered in advance. I do not want to stop to number exhibits or the pages as they are put in. So, if you would, therefore have your exhibits numbered, Exhibit 1 and number the pages 1(a), (b), (c).

This is very helpful when you are writing your finding and your proposals, so that if something is on Page 1(c) you can refer to it as 1(c) rather than Exhibit 1 and then you would have to hunt and peck for the page. I found and we follow the rule of numbering each page, Exhibit 1 and then Page 1(a), (b), (c). The first page would be 1(a). When you present it, you label it Exhibit 1(a) through 1(d) if it has four pages.

MR. HILLMAN: Yes, sir.

If I may note, in (i) of our page entitled Documents and Exhibits we point out to the Special Master that we have requests for discovery later in the pre-trial memorandum and there is a continuing investigation in

this case. And I know the company has expressed to me the thought that they are continuing their investigation. So, we would ask that documents and exhibits may be added to this list as a result of our discovery and investigation up until some agreed point, maybe five or ten days before trial and that we have an exchange of these documents and exhibits so that both parties will be apprised of what will be entered and still have an opportunity to further their discovery.

We wonder if we could agree on a date five days before the trial? That gets us over the weekend. Why don't we say one week prior to trial?

MR. SWIFT: In which to furnish aditional names?

MR. HILLMAN: Why don't we do that on additional names of witnesses and documents and exhibits?

MR. SWIFT: Always bear in mind —

Mr. HILLMAN: There will be rebuttal?

MR. SWIFT: Rebuttal anytime.

SPECIAL MASTER: What is your agreement?

MR. HILLMAN: One week prior to the date of trial.

SPECIAL MASTER: For both parties?

MR. HILLMAN: Both parties, final list and documents for the case and chief.

SPECIAL MASTER: Let us say, for rebuttal, if we have a recess, which we well may have, that you will

submit the rebuttal witnesses five days before the date for your case to begin?

MR. SWIFT: For the resumption, assuming there is a recess?

SPECIAL MASTER: Yes, five days before that.

MR. HILEMAN: Page 3 is our list of witnesses. You will see the company has also submitted a list of witnesses. There is one change which we just put in. I am not sure if it is on the original. I put that in later, the second witness, the Board's second witness, Robert Ayers. We changed the paragraph number there so that it reads (GEE, A.) The company also has submitted a list of witnesses.

Again on Page 9 our agreement has already covered any additional names. We point out, on Page 10 of the Board's Pre-Trial Memorandum, we point out four cases which are Board cases either in whole or in part by the Fifth Circuit. The first two, A and B, are cases on which this contempt petition is based. C and D are two cases and both were tried and decided by the Board before this petition was submitted, but the court's decisions, the Fifth Circuit's decisions, were not handed down I believe until after the petition was filed.

We make the request that the Special Master take official notice of these decisions.

MR. SWIFT: Is this the time for our to object to some of this?

SPECIAL MASTER: Yes, but first let me ask a

question here. I am again using my background and experience here at Federal Trade and the way we handled matters. We conform pretty much to the rules of Federal procedure.

By official notice you are merely asking me to take official notice of the cases. I find ambiguity in my mind in that you ask me to take notice of the cases but not specific facts therein and statements made in these cases.

MR. HILLMAN: Excuse me, that would include the facts found by the Board and proved by the court in those cases and the statements made therein.

SPECIAL MASTER: My difficulty then is this, that we do not take official notice generally of cases and facts in cases, you see. Official notice generally is some well-known fact that, like today is Friday, June 7th or some fact that is so well-known that there is no dispute about it. I realize that some agencies have unique rules. Does your agency have particular rules covering official notice and what it encompasses?

MR. HILLMAN: What I am driving at, in several recent contempt cases, both in the Fifth and Sixth Circuits, the court held that the Special Master in making his decision in contempt matters may take into account the company's anti-Union animus as displayed in prior cases.

SPECIAL MASTER: Then you are not asking me to take notice of specific facts, merely of the fact that they have previously been proceeded against and the outcome of the case, but not any of the language therein? You

are not going to use as a finding of fact anything you are going to lift out of that case?

MR. HILLMAN: No, sir.

SPECIAL MASTER: Like in a criminal proceeding before sentencing, you are trying to make known to me the criminal record of the person sentenced?

MR. HILLMAN: That is right.

MR. SWIFT: No, sir, he is trying to get you to have that in mind so you will be prejudiced, so that you will know that we were charged with having violated two specific court decisions, and you are to consider these two other cases so that it will assist you in finding we violated these cases. We think it is deprivation of our constitutional rights.

SPECIAL MASTER: As I said, in a criminal case this occurs prior to sentencing.

MR. SWIFT: Which would be the Fifth Circuit that is going to recommend.

SPECIAL MASTER: I will not rule on this now. What I suggest you do — as I said, I am not familiar with the cases you are relying on — if you want to use the facts of these other cases in order to make a finding of previous conduct and the specifics of that conduct, that is one thing, you see, but if you want to use these cases for the rules of law and the application of law, that is another thing. You see?

MR. HILLMAN: I see.

SPECIAL MASTER: I want to be clear of what you want me to take official notice of. I would not be adverse to follow the legal theories and what those cases stand for, but I have some hesitancy without some cases pointing out the Master's duty to also add up unrelated incidents to compute or to buttress your allegations in this case so that I can consider something outside this record, not the character of these people, so to speak, and a background of previous activity. If that is proper, I say I don't know. You will have to prove that for me, and you will have a chance, Mr. Swift, to also prove it.

I think this would come probably in your briefs at the time you submit the case because I will not have to face up to this anyway until then, if you want to do it that way, or you can do it previous to that. I am not going to rule on it until the case is over. I will rule in my decision anyway.

MR. SWIFT: I want to clarify in my mind, I want to make sure as you consider this case you are going to consider whether or not we have violated two specific court decisions. We think that is the only issue. Then there is the 47 things they say we did that were in violation of those two. We think the issue is that simple. We think we might have done at any other time except for those 47 different allegations —

SPECIAL MASTER: I am not clear on just what these cases cover.

MR. SWIFT: It shows things we did at other times.

SPECIAL MASTER: Is this prior to the order?

MR. JONES: The two cases about which we are arguing are decisions of the Fifth Circuit.

SPECIAL MASTER: I am asking when did the action occur.

MR. SWIFT: Prior to the time.

SPECIAL MASTER: It takes a long time, a year and a half, two years. Let us get this clear, Mr. Hillman. Is that correct?

MR. HILLMAN: It is my understanding of the facts which are involved, Southwire Company and the National Labor Relations Board, 385F7335 and National Labor Relations Board 24841, Fifth Circuit, C and D, that the facts involved in those cases are post decrees that are involved in this case.

SPECIAL MASTER: We have a dispute on that right here. What are the facts? This should not be in dispute.

MR. SWIFT: I myself understood your question. I was stating they were prior to the action that we were alleged to have committed in this instant case before you.

SPECIAL MASTER: Prior to the decree they say you violated?

MR. SWIFT: Yes, sir.

SPECIAL MASTER: Post decree in C and D, what about A and B?

MR. HILLMAN: There are two decrees upon which the facts are based.

SPECIAL MASTER: Nothing that you are concerned with? We are concerned with C and D. You want to use the facts as found in those cases in addition to the facts you are going to establish in this case as a basis for the final decision here?

MR. HILLMAN: If I may state our position here, the Fifth Circuit and Sixth Circuit both have held in recent cases that a Special Master in deciding a contempt case, in making a resolution of the facts, may examine the course of the company's labor relation history to determine anti-union animus.

SPECIAL MASTER: That is pretty general. What are the specifics of it? I am breaking it into post decree facts and pre decree facts.

MR. HILLMAN: He may use this history of labor relations to determine motivation for post decree actions which are alleged of being contemptuous of the court's decree. We believe the history of this company makes it clear and will aid you in deciding the motivation for many of the actions that we allege are put or violative of the court decree and put the company in contempt.

SPECIAL MASTER: Then actually you are using these facts not so much to prove actual facts, but to show a state of mind?

MR. HILLMAN: That is correct.

SPECIAL MASTER: Brief that.

MR. SWIFT: May I make a comment? I would like at this time to remind you that you have a different standard of proof in a contempt matter than you do in a proceeding initiated by the Board and carried through. And so, the Fifth Circuit in deciding these two cases found in affect their hands tied if they found what is known as substantial evidence on the record, considered as a whole, which we found nothing more than a scintilla of evidence.

But in a civil contempt case there has to be a preponderance of the evidence, which is significant. There are some cases we will call to your attention that goes even beyond a preponderance of the evidence, somewhere between that and beyond a reasonable doubt, which is required in criminal cases. And if it is up to you to consider cases decided with a different degree of proof, a different amount of proof, then we say we are being hanged, so to speak, by something not properly before you, because you have to find beyond the evidence.

SPECIAL MASTER: You say there was a different standard?

MR. SWIFT: A different standard. Regardless of what the Fifth Circuit wanted to do, they couldn't. They decided initially they would have to go another way. I recall that from Judge Bell from the bench.

SPECIAL MASTER: I am not going to make a decision. Mr. Hillman, when you brief I want you to be most precise in advising me what the purpose of your official notice is, and then prove it on that basis as to whether or not the court upheld the position that you are taking, you see, not a general statement of official

notice and let it go at that. I want to know precisely what it is you are seeking to do through this official notice.

MR. HILLMAN: We will do it.

SPECIAL MASTER: If it is merely to be part of the background information, when I weight the testimony, you see, as to how I evaluate the testimony, that is one thing, like to show the character of a witness. If you bring in a witness to repudiate some witness' character, then, I will weigh that testimony in evaluating this witness' testimony.

Now, if your purpose in using the respondent's past actions as reflected in these cases is so that I can evaluate the character of this company, this is in the abstract because we are dealing with witnesses and actual matters that has occurred, you see. So, it has no relevance to me except as a general proposition of what the company's background is. You want me to have that in the back of my mind as I listen to these witnesses and say, "Well now, these are the company's witnesses and they are not reliable on particular evidence that is being given," and throw that in the hopper to bring that up or down, if that is your purpose, and I believe that is what it is.

As I listen to the testimony I would say, "Well, don't give that too much weight, because you have these two cases that say they have been in trouble before," or whatever it shows. If that is your purpose, give me cases on it that say I am not to keep that in mind and says that every time a company's witness comes on that I am to keep in mind, "Well, these cases have al-

ready shown so and so." If the cases show it that way, you tell me.

Mr. Swift, you tell me if it does not.

MR. SWIFT: I think that is what you have in mind.

MR. HILLMAN: I think that is close to it.

SPECIAL MASTER: As I balance the scales you always want me to put extra weight here because of C and D here and get her down a little bit. Throughout the case you want me to cut down on the evidence.

MR. HILLMAN: I think that is the position we are taking.

SPECIAL MASTER: You give me cases that tell me to do that. I want it clear in that court decision that he keeps wanting us to put on the scale added weight against respondent. Every time I evaluate some evidence keep putting that weight over to keep the Board's scale tipped a little bit.

I would like to get the factual situation well in mind so that when I come to read a case I can read it in that perspective. Some cases say a lot of things, but when you come down to it that was not the case at all. When you cite it, let us get right down to that type situation. You may well be right, but I will rule on that whenever you — if you want to submit a brief on that it might be helpful. You get that out of the way before we do that in here.

MR. HILLMAN: Would you like us to write a pre-trial brief on that point?

SPECIAL MASTER: I think it would be helpful. It would save you time at a later date. But I will not rule on it before I rule on this case. In my final decision I will make a ruling on that point as I view the facts here.

As I follow these cases, he is asking me to take official notice of the ruling. He is asking me to take official notice in evaluating these two cases.

MR. SWIFT: I know you will not be throwing that little grain of weight over here, though.

SPECIAL MASTER: If I rule I am not taking official notice, you can be quite sure that as a skilled trier of facts, which is what we are, that I will not. I am not a jury. If this had been a jury trial, the jury would have been prejudiced and you would have to excuse them and get a new jury. A judge hears a lot of things he should not hear but the case is not assigned to another judge, because he is supposed to be able to keep his mind separate as to the facts he is supposed to take and evidence not to take and not to use that as a decision.

If I were to do that and I should not, then you would get the case on review and you could reverse it for that very reason.

MR. SWIFT: We hope it will not come to that.

SPECIAL MASTER: It would show in my reason. I would hope I would be careful not to make that error.

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 20,008 and 21,784

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

SOUTHWIRE COMPANY AND ROY RICHARDS,
Respondents.

ORDER DENYING PETITIONER'S REQUEST FOR OFFICIAL NOTICE

Petitioner in its Pre-trial Memorandum made the following request:

> Petitioner respectfully requests that official notice[1] be taken of the reported cases listed below in which the respondent has been found in violation of the National Labor Relations Act.
>
> (a) *N.L.R.B. v. Southwire Co.*, 133 NLRB enforced 313 F. 2d 638 (C.A. 5 1963).
>
> (b) *N.L.R.B.* v. *Southwire Co.*, 145 NLRB 1329, enforced in part, 352 F. 2d 346 (C.A. 5 1963).
>
> (c) *Southwire Co.* v. *N.L.R.B.*, 159 NLRB 394, enforced in part, 383 F. 2d 235 (C.A. 5 1967).

[1] The Special Master assumes this term to be equated to Judicial Notice as used.

(d) *N.L.R.B.* v. *Southwire Co.*, 164 NLRB No. 135, enforced, 393 F. 2d 106 (C.A. 5 1968).

On July 25, 1968 Petitioner filed a brief supporting its request and on September 9, 1968 Respondents filed their brief in opposition.

After due consideration, the Special Master is of the opinion that the request should be denied.

The doctrine of Judicial Notice when invoked excuses "the party having the burden of establishing a fact from the necessity of producing formal proof of the fact by sworn witnesses and authenticated documents or objective evidence." *McCormick on Evidence*, 1965 Ed., § 323.

Petitioner in its request has failed to specify a single fact to be noticed, but seeks to incorporate all evidence in four prior proceedings into the record in this proceeding under the doctrine of Judicial Notice. Even though under certain circumstances a fact may be noticed, it still is subject to being rebutted by the opposing party. Under the present proposal, respondents are faced with an almost impossible task since in the absence of specific noticed facts, they must be prepared to rebut all the evidence in the noticed earlier cases or suffer the consequences. The Special Master can find no such precedent under the doctrine of Judicial Notice.

Even if the facts of the basic cases, which show a clear pattern of opposition to union organization"[2] had been spelled out by petitioner in its request, the Special

[2] Petitioner's Memorandum Supporting Request for Official Notice, page 1.

Master has serious doubts whether Judicially Noticing them would meet the requirements of procedural due process. It has been held that a referee in bankruptcy may only consider the evidence which was presented to him at a hearing upon a trustee's exception to a mortgagee's priority claim and could not consider other evidence which might have been in the referee's files in the bankruptcy administration proceeding. *In re Aughenbaugh, Appeal of Kunkel et al* (125 F. 2d 887, C.A. 3, 1942). In that case Judge Maris stated:

> In passing upon this question we may consider only the evidence which was presented to the referee at the hearing upon the trustee's exceptions to the mortgagee's priority claim. We may not consider other evidence which may have been in the files of the referee in the bankruptcy administration proceeding. To hold otherwise would be to violate the fundamental concept of procedural due process that a party to litigation is entitled to have the evidence relied on by his opponent presented at the hearing of his case so that he may have the opportunity to cross-examine his opponent's witnesses and to offer evidence in rebuttal. As the Supreme Court said in Interstate Commerce Commission v. Louisville R. Co., 277 U.S. 88, 93, ". . . manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute."

The Special Master is well aware that in Administrative Proceedings the National Labor Relations Board and other governmental agencies make wide use of the doctrine of Official Notice. *Manco Watch Strap Co., Inc.*, 60 FTC 495 (1962). In reviewing its application to

administrative proceedings, the Fifth Circiut recently had occasion to comment:

> However salutary the liberal use of official notice may be as an aid to the Federal Trade Commission and other administrative agencies in the dispatch of their business due process must be observed in such use. *Dayco Corp.* v. *F.T.C.*, 362 F. 2d 180 (C.A. 6, 1966).

The Sixth Circuit then went on to say that "the critical noticed facts . . . did not rest upon its [F.T.C.] 'accumulated knowledge' or its experience or expertise, but rather upon the testimony of individual witnesses in a particular prior case" and quoted with approval the following:

> It needs no argument to demonstrate that agencies may not take notice of the "litigation facts" involved in a particular case; to do so would be to shift the burden of proof and make a mockery of the hearing procedure. The doctrine of notice should be limited to facts of a general nature, representing generalizations distilled from repeated demonstrations. Cooper, *State Administrative Law*, Vol. I. p. 413.

Even admitting that the National Labor Relations Board and its Trial Examiners in an administrative proceeding may be justified in taking Official Notice of a respondent's "anti-union animus" as established in previous Board proceedings (See *Southwire Company v. N.L.R.B.*, 159 NLRB 394 (1967) enforced in part, 383 F. 2d 235 (C.A. 5)), it does not necessarily follow that this practice would be justified in a contempt proceeding. Evidence relied upon in Board proceedings need only

be supported by "substantial evidence" while the quantum of proof required in a contempt proceeding must be "clear and convincing." Petitioner, in seeking to invoke the doctrine of Official Notice, is attempting to establish critical facts in a contempt proceeding which were established in earlier administrative proceedings under the "substantial evidence" rule. The doctrine of Official Notice should not be used to alter the degree of proof required in a contempt proceeding.

Accordingly,

IT IS ORDERED that the request for Official Notice be denied.

WILLIAM K. JACKSON
Special Master

At Washington, D. C.
Dated: September 24, 1968

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 20,008 and 21,784

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

SOUTHWIRE COMPANY AND ROY RICHARDS,
Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy each of the Special Master's Order Denying Petitioner's Request for Official Notice in the above-captioned matter has this day been served by mail on the following counsel for petitioner and upon counsel for respondents:

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N. W.
Washington, D. C. 20570
Swift, Currie, McGhee & Hiers
1614 Fulton National Bank Bldg.
Atlanta, Georgia 30303

ESTHER C. ANDRIJAUSKAS
Clerk

September 24, 1968

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 20,008 and 21,784

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

SOUTHWIRE COMPANY AND ROY RICHARDS,
Respondents.

ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER DENYING PETITIONER'S REQUEST FOR OFFICIAL NOTICE

By motion dated September 30, 1968, petitioner requested the Special Master for reconsideration of his earlier order denying petitioner's request for official notice.

In support of its position, petitioner in part states:

> 4. The Special Master in *N.L.R.B.* v. *My Stores, Inc.*, 67 LRRM 2733, 2734 (C.A. 7, 1968) based his findings on the evidence adduced at the hearing in the contempt case without reference to the facts established in the underlying case. The Court of Appeals for the Seventh Circuit found this to be a fatal error and rejected the report of the Special Master, saying (67 LRRM at 2734):
>
> The Court has considered the Report,

> Exceptions and briefs, and has in conference voted to sustain the Board's Exceptions and to reject the Report of the Special Master. The Court finds that the question of Respondent's motive . . . should have been and was not, considered in the light of this Court's original opinion . . . and the facts therein upon which the Court noted Respondent's 'animosity' toward the Union.

Petitioner, in quoting what appears to be most appropriate language, apparently has overlooked the Order of Reference in that matter set forth in the Court's opinion which states (67 LRRM at 2733):

> Whether *prior* to the decree of *July 6, 1965*, to wit, in *September* and *October 1963*, My Stores, Inc. had made *bona fide* and valid offers of reinstatement to the unfair labor practice strikers, other than Arlin Farthing and Kenneth W. Reed, entitled to such offers under the decree and (2) whether My Stores, Inc. was justified in failing to make any offers of reinstatement to Arlin Farthing and Kenneth W. Reed. [Emphasis supplied.]

When the Court referred to its "original opinion . . . and the facts therein upon which the Court noted Respondent's 'animosity' toward the union", it referred to its decision of April 1965 reported at 345 F. 2d 494.

In its Order of Reference the Court specifically directed the Special Master to consider events "*prior* to the decree of July 6, *1965*, to wit, in September and October *1963*." To the extent that the Court had already considered and made findings of fact concerning this *earlier time period*, "to wit, in September and Oc-

tober 1963", the Special Master was obligated and bound to consider the evidence "in the light of the Court's original opinion."

In the instant proceeding the Special Master finds no such direction to an *earlier time period* contained in the Court's Order of Reference filed May 8, 1968. On the contrary, the events with which we are concerned here, as alleged in the Petition for Adjudication in Civil Contempt filed December 28, 1967, all occurred subsequent to this Court's decrees. In short, it is respondent's acts and practices, which occurred *after* this Court's opinions, that are in issue here. In the Special Master's opinion, the difference in time period is of the essence and the opinion in *My Stores, Inc.* must be read in that context.

However, let the Special Master make it abundantly clear that he is not holding and never has held that this proceeding in civil contempt is not a part of and a continuation of the underlying cases, to wit: *N.L.R.B. v. Southwire Co.*, 133 NLRB 83, enforced, 313 F. 2d 638 (C.A. 5, 1963) and *N.L.R.B. v. Southwire Co.*, 145 NLRB 1329, enforced in part, 352 F. 2d 346 (C.A. 5, 1965), and that the records in those cases are not a part of these proceedings for whatever proper purpose they may be utilized. Accordingly, it is unnecessary in the Special Master's opinion that he formally declare that he is taking official notice thereof. In any event, should this Court disagree with the position of the Special Master, it may on review, without remand, take cognizance of any or all of the facts of these cases to the extent it may deem appropriate. Therefore,

IT IS ORDERED that the Motion for Reconsideration be denied.

WILLIAM K. JACKSON
Special Master

At Washington, D. C.
Dated: October 4, 1968

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 20,008 and 21,784

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

SOUTHWIRE COMPANY AND ROY RICHARDS,
Respondents.

REPORT OF SPECIAL MASTER

William K. Jackson, Special Master

Arnold Ordman, General Counsel; Dominick L. Manoli, Associate General Counsel; Marcel Mallet-Prevost, Assistant General Counsel; Paul Elkind, Allen J. Berk, and Robert M. Lieber, Attorneys for the National Labor Relations Board, for Petitioner.

Swift, Currie, McGhee & Hiers, Atlanta, Georgia, By Frank M. Swift and David M. Vaughn, Counsel for Respondents.

PRELIMINARY STATEMENT

The National Labor Relations Board (hereinafter called the Petitioner or Board) on December 27, 1967, petitioned this Court to adjudge Southwire Company (hereinafter

called Southwire, Respondent or Company) and Roy Richards, President and principal stockholder of said corporate respondent, and each of them, in civil contempt of this Court for failing and refusing to comply with decrees of this Court entered on April 29, 1963 and November 23, 1965.

Pursuant to the Court's Order to Show Cause entered herein on February 9, 1968, the respondents filed their answer to said petition for adjudication in civil contempt on March 13, 1968, and the issues were thereby joined. On March 25, 1968, the petitioner moved the Court to appoint a Special Master to determine the issues of fact presented by these proceedings; and on May 8, 1968, the Court issued an Order of Reference appointing William K. Jackson as Special Master to determine the issues of fact and law raised by the respective pleadings and to submit to this Court a report thereon with his recommendations.

Pursuant to the order of the Special Master dated May 16, 1968, a pretrial conference was held on June 7, 1968 at Washington, D. C., at which time the parties made certain pretrial submissions in accordance with the Special Master's order for the purposes of simplification of the issues; obtaining admissions of fact and authentication of documents; and discovery of relevant material, etc.

On July 18, 1968, after considering briefs by the parties submitted thereon, the Special Master issued an order directing respondents to comply with petitioner's requests for production.

On September 24, 1968, after considering briefs by

the parties on the question, the Special Master issued an order denying petitioner's request that official notice be taken of the reported cases listed below in which the respondents have been found in violation of the National Labor Relations Act:

(a) *N.L.R.B.* v. *Southwire Co.*, 133 NLRB 83, enforced 313 F.2d 638 (C.A. 5, 1963).

(b) *N.L.R.B.* v. *Southwire Co.*, 145 NLRB 1329 enforced in part, 352 F.2d 346 (C.A. 5, 1965).

(c) *Southwire Co.* v. *N.L.R.B.*, 159 NLRB 394, enforced in part, 383 F.2d 235 (C.A. 5, 1967).

(d) *Southwire Co.* v. *N.L.R.B.*, 164 NLRB 135, enforced, 393 F.2d 106 (C.A. 5, 1968).

On September 30, 1968, petitioner filed a motion and supporting memorandum for reconsideration of the Special Master's order denying petitioner's request for official notice. In his order dated October 4, 1968, denying petitioner's motion for reconsideration of its request for official notice, the Special Master in part stated:

> However, let the Special Master make it abundantly clear that he is not holding and never has held that this proceeding in civil contempt is not a part of and a continuation of the underlying cases, to wit: *N.L.R.B.* v. *Southwire Co.*, 133 NLRB 83, enforced, 313 F.2d 638 (C.A. 5, 1963), and *N.L.R.B.* v. *Southwire Co.*, 145 NLRB 1329, enforced in part, 352 F.2d 346 (C.A. 5, 1965), and that the records in those cases are not a part of these proceedings for whatever proper purpose they may be utilized. Accordingly, it is unnecessary in the Special

Master's opinion that he formally declare that he is taking official notice thereof.

Pursuant to a notice of hearing issued by the Special Master on September 4, 1968, hearings were held in this matter from October 7 through October 15, 1968, for the presentation of petitioner's case and from November 11 through November 21, 1968, for the receipt of respondents' defense and rebuttal by petitioner, at the Holiday Inn, Route U.S. 27, Breman, Georgia.

Pursuant to leave granted by the Special Master, both parties submitted proposed findings of fact and briefs in support thereof on March 14, 1969, and both parties also filed reply briefs on March 28, 1969. Oral argument was waived.

The proposed findings of fact and briefs in support thereof have been carefully considered by the Special Master and those findings not adopted, either in the form proposed or in substance, are rejected.

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding together with the proposed findings, conclusions and briefs filed by both parties, as well as their replies, the Special Master recommends to the Court the adoption of the findings of fact, conclusions and order set forth in this report.

For the convenience of the Court and the parties, the findings of fact include references to principal supporting items in the record. Such references are intended to serve as convenient guides to the testimony and exhibits supporting the recommended findings of fact, but do not

necessarily represent complete summaries of the evidence considered in arriving at such findings.

References to the record are made in parenthesis, and certain abbreviations, as hereinafter set forth, are used:

Tr.—Transcript of Testimony

PX—Petitioner's Exhibits

RX—Respondents Exhibits

PB—Petitioner's Brief

RB—Respondents' Brief

PRB—Petitioner's Reply Brief

RRB—Respondents' Reply Brief

D—Billingsley's Deposition

Sometimes references to testimony cite the name of the witness in addition to the abbreviation Tr. and the page number.

THE DECREES

The operative portions of the two Board orders,[1] which were enforced by this Court and upon which the present civil contempt proceeding is based, are couched in the general statutory language as well as in terms of specific proscriptions. The 1963 decree (No. 20,008) forbids the Company from discouraging members in Local 613, International Brotherhood of Electrical Workers, or "any other labor organization," by discharging or otherwise

[1] On April 29, 1963, this Court issued its decree (313 F.2d 638) enforcing the Board's decision and order of September 12, 1961 (133 NLRB 93). On November 23, 1965, this Court issued its decree (352 F.2d 346) modifying and enforcing as modified the Board's decision and order of January 29, 1964 (145 NLRB 1329).

discriminating against its employees; unlawfully interrogating its employees; threatening employees with reprisals or promising them benefits to discourage union affiliation or support; and "in any other manner" interfering with, restraining or coercing the employees in the exercise of their rights under Section 7 of the Act with respect to the IBEW or "any other labor organization." The Court's 1965 decree (No. 21,784) forbids the Company from discouraging membership in the International Union of Electrical, Radio & Machine Workers (IUE) by discharging or otherwise discriminating against its employees, maintaining or enforcing an unlawful nonsolicitation rule; and from "in any like or related manner" interfering with the Section 7 rights of its employees with respect to any labor organization. The broad restraining orders were adopted by the Board and enforced by this Court to prevent repetition of the same or related violations.

The pertinent terms of the two Court decrees involved here are derived from and embody Sections 8(a)(1) and (3) of the Act. Section 8(a)(1) provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act, namely, "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and . . . the right to refrain from any or all such activities . . ." Section 8(a)(3) provides that it is an unfair labor practies for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organiza-

tion . . ." The Court's decree "laid upon [the Company] a duty to obey specified provisions of the Statute." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). Thus, the substantive standard against which the Company's conduct is to be measured in this contempt proceeding is the statutory standard, as amplified by administrative and judicial interpretation.

Moreover, the Company is guilty of civil contempt whether or not its disobedience was willful. As the Supreme Court stated in *McComb v. Jacksonville Paper Co.*, *Supra*, at 191:

> The absence of willfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the Court or to compensate for losses of damages sustained by reason of non-compliance. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act.

Unlike criminal contempt proceedings, liability in civil contempt need not be established by proof beyond reasonable doubt, but merely by "clear and convincing evidence." *N.L.R.B.* v. *Tupelo Garment Co.*, 122 F.2d 603, 606 (C.A. 5, 1941). Accord, *Oriel* v. *Russel*, 278 U.S. 358, 364 (1929).

General Background Information

In the summer of 1967, Southwire had a total of approximately 1,500 employees of which roughly 1,200 were engaged in production and other related activities. The plant, located in Carrollton, Georgia, operated on a three-shift basis with approximately 600 employees on the first

shift (7:00 a.m. to 3:00 p.m.); the remainder divided among the second shift (3:00 p.m. to 11:00 p.m.) and the third shift (11:00 p.m. to 7:00 a.m.). All personnel matters, employee relations and labor relations matters were the direct responsibility of Robert Brown, Assistant Vice-President and Personnel Director, who had a staff of seven professional and a number of clerical employees to assist him (Tr. 984-989). At that time the entire Southwire operation was situated on a 26-acre tract of land with over a million square feet under one roof (RX 216; Tr. 987-990, 1082-1084).

Since 1962, two different labor unions (I.B.E.W. and I.U.E.) have intermittently attempted to organize Southwire employees without success (Tr. 1085, 1719). During the summer of 1966, Harold McIver, representative of the United Steel Workers of America assigned to the Industrial Union Department AFL-CIO, attempted to start an organizing campaign at Southwire on behalf of the I.U.E. McIver tried to establish an organizing committee by contacting Southwire employees, but his organizing campaign was cut short by arrest for soliciting union membership in the City of Carrollton without a business license (Tr. 319-320, 1918) McIver resumed his organizing efforts at Southwire in the latter part of April 1967 by contacting as many employees as he could, holding meetings, obtaining employees' signature on petitions for a union organizing committee, etc. (Tr. 321-322; PX 15A through PX 15G).

During the Union organizational campaign in the spring of 1967, Southwire held frequent management meetings at which its legal counsel instructed manage-

ment personnel on how to conduct themselves with relation to their employees and cautioned them to avoid violations of the Court decrees (Tr. 997-1000, 1084-1086; see Stipulation at Tr. 1114).

On May 31, 1967, the Union filed a request for an election with the Atlanta Regional Office of the National Labor Relations Board and the Board immediately contacted Southwire by telephone in order to arrange a mutually agreeable date for a representation election. After consultation with its legal counsel, the Company agreed to the holding of an election on June 23, 1967 and through its legal counsel informed the Board later that afternoon by telephone of such fact. Thereupon the election was set that same afternoon by the Board for June 23, 1967 (Tr. 1000-1001, 1064-1066).

The Company conducted a vigorous and spirited campaign against the Union during the month of June 1967; daily notices were posted on plant bulletin boards, letters were mailed to employees' homes, match books were placed in vending machines, leaflets were distributed at the gate, etc. The Company's campaign was supervised by Personnel Director Brown with the advice of legal counsel who were present in the plant daily (Tr. 1002). The Company held frequent meetings during this period with its supervisors, and they were encouraged to talk to their employees about the election and the Union (Tr. 1004). By notice (RX 211), employees were encouraged to ask questions of their supervisors. On June 14, 1967, a letter (RX 212) was sent to all employees with a self-addressed postpaid card enclosed for employees' questions. Approximately 75 to 100 questions were received in response, and Southwire answered these question by bulletin board notices (Tr. 1004-1007). A small handbook of instruc-

tions was prepared with the assistance of legal counsel and distributed to all supervisors on June 9, 1967 (RX 213; Tr. 1007).

The Company portion of the campaign lasted approximately three to four weeks during which time the Company disseminated a great deal of anti-union literature in the form of bulletin board notices, letters, special pay envelopes and leaflets distributed at the plant gate (Tr. 1011-1012, 1014-1018, 1023-1025, 1028-1038, 1093, 1101-1105).[2] The aforesaid notices, letters and leaflets leave no doubt that respondents are opposed to the unionization of their employees and have sought to leave no one in doubt of that fact.

The Union campaign which had commenced in late April 1967 with organizing meetings, circulation of petitions, and the passing out of leaflets at the gate gradually increased in intensity (Tr. 322-325). The distribution of union buttons commenced in late April and early May, although it was difficult at first to get people to wear them (Tr. 211-212, 334, 1722). As the Union campaign progressed, the number of leaflets distributed increased (Tr. 324) and a week before election distribu-

[2] The following statements are illustrative of the antiunion contents of the leaflets, notices, etc.

RX 211 "If you know the truth you will say NO to unionism — Vote NO."

RX 212 "Unionism now threatens all of us."

RX 214 "Don't be tricked by empty union promises." together with a cartoon depicting a group of union leaders sitting around a table one of whom is saying, "We will trade the profit-sharing for union dues checkoff."

See also PXs 36-40, letters sent by Company to employees; PXs 41-44, leaflets handed out at gate by the Company in June; PX 46, leaflet "The I.U.E. is Losing Members" stapled to one of the employees' paychecks for June; PX 47, envelope prepared by Brown containing four one dollar bills withheld from the employees pay for use on Friday, June 16, the pay day immediately prior to the election, representing union dues if Union won election; PX 48, Company leaflet "Vote No Because."

tion was practically daily to all three shifts (Tr. 325) and the wearing of Union buttons reached its peak about two days prior to the election (Tr. 334). On June 21, 1967, the Union passed out a leaflet (PX 16A-16B) which bore the names of 91 Southwire employees on the Union organizing committee (Tr. 326).

The election was held as scheduled on June 23, 1967. The Union, as characterized by respondents' counsel, was "slaughtered". The vote was 269 "Yes" votes for the Union and 518 "No" votes for the Company, with 243 challenges (Tr. 342).

It should be noted here that the unsuccessful efforts of unions to organize Southwire's employees in the past have resulted in prior proceedings in this Court.[3] See *N.L.R.B. v. Southwire Co.*, 313 F. 2d 638, (C.A. 5, 1963); *N.L.R.B. v. Southwire Co.*, 352 F.2d 346, (C.A. 5, 1965); *Southwire Co. v. N.L.R.B.*, 383 F.2d 235, (C.A. 5, 1967); *Southwire Co. v. N.L.R.B.*, 393 F.2d 106, (C.A. 5, 1968). There can be question that the Company possesses deep-seated anti-union animus not only as recorded in prior proceedings of this Court, but as clearly demonstrated by its vigorous opposition to the 1967 Union organizing campaign as reflected in the printed matter distributed to its employees. The record of this proceeding as a whole leaves no doubt that the Company, its officers and its supervisory personnel are unalterably opposed to any unionization of Southwire.

[3] Matters of record in the proceedings out of which the contempt grows may be judicially noted. See 17 CJS §81(4), Contempt, footnote 62, p. 213 citing *Nichols v. Quinn*, 147 p. 1103, 94 Kan. 742.

The Allegations

The Board's petition alleges 47 separate and distinct violations of this Court's outstanding decrees. Evidence in support of 46 of these charges was introduced at the hearings and one charge was withdrawn. With the exception of the charge of surveillance of the employees' Union activities by Roman Security Agency, Inc., which commenced August 1, 1964, the remainder of the charges occurred during the period April 1967 through July 1967.

Prior to the election on June 23, 1967, the alleged violations followed a pattern of *surveillance* of the employees' union activities; *soliciting* the employees to pass out anti-union leaflets, remove union badges, and engage in surveillance; *interrogating* employees concerning their own and other employees' union activities; *offering* benefits to the employees if they refrained from union activities; *granting* benefits to the employees to discourage support of the union; *threatening* employees with changes in working conditions, discharge, closing of the plant, and other reprisals if they supported the union; *coercing* employees engaged in protected union activities; *discriminating* against employees by denying them normal work and overtime, assigning them to perform difficult tasks, issuing warning slips, laying them off and discharging them, all on account of their union activities and sympathies. *After the election* it is alleged the Company continued to violate this Court's decrees by discriminating against pro-union employees by issuing warning slips, laying them off and discharging them.

Since many of the allegations are similar in nature and relate to the same department or supervisor, they will

be considered by the Special Master in that context rather than in the order in which they are set forth in the petition. The discussion, however, will be clearly keyed to the individual allegations for cross-reference purposes.

SUMMARY OF THE EVIDENCE and RECOMMENDED FINDINGS OF FACT

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Page 13

When viewed in the light of the Company's general hostility to the Union, it is strange indeed that a foreman working in close proximity to and having personal contact with the first employee to wear a Union button in the Southwire plant would have no knowledge or recollection of such an event.

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Page 33

In making a determination as to the Company's motive "anti-union bias and demonstrated unlawful hostility are proper and highly significant factors for . . . evaluation."

• • • •

Page 34

Such disparate treatment, read in the light of the Company's anti-union animus, indicates that the Company's action was motivated by the Griffins' union activities.

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Page 38

When the statements are measured against the Company's long history of opposition to unionization, the vigorous anti-union campaign being waged by the Company simultaneously, and the fact that the conversation was private and unsolicited by Thomas, then words that on the surface may seem casual and harmless assume the tone of ominous and subtle threats.

* * * *

Page 47

Ledford, who was third shift superintendent, held a position of high authority and any remarks he might make to an employee under the circumstances present here must be measured against the background of the Company's long history of opposition to unionization.

* * * *

Page 70

The conversation took place against a background of an extremely hostile and anti-union employer, who resorted to surveillance of Union activities by a private detective agency; the interrogator was a high company official (Plant Superintendent); the questioning took place during the Union organizing campaign and had threatening overtones.

* * * *

Page 84

North's conversation with Laminack is not an isolated incident and must be measured against the background of the Company's long history of opposition to unionization and its deliberate policy of surveillance of union activities. In this context Laminack's denial that he

threatened "to be on" North is not credited.

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Page 106

The poll was conducted against a backdrop of hostility to the Union and served the purpose of pinpointing those pro-union employees who in response to the first question voted affirmatively that they wanted the Union to be their representative.

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Page 135

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Page 136

In making a determination as to the Company's motive, "anti-union bias and demonstrated unlawful hostility are proper and highly significant factors for . . . evaluation."

• • • •

Page 156

The Company's defense that Davis was discharged for legitimate reasons, when viewed in the perspective of the Company's previously found proclivity to resort to illegal acts to discourage Union organizing efforts, is rejected.

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Page 162

Viewed in the overall hostility of respondents to Union activities, it is not unwarranted to infer that such disparate treatment can be explained by Verna Cato's rela-

tionship to Henry Cato, who was one of the principal Union adherents.

• • • •

Page 209

RECOMMENDED CONCLUSIONS OF LAW AND ORDER

1. Since the entry of the respective decrees herein, and at all times hereinabove referred to, the Company and Roy Richards, through their officers, representatives and agents, mentioned above, have in violation of paragraphs (b) and (c) of the Court's decree of April 29, 1963, and paragraphs (b) and (c) of the Court's decree of November 23, 1965, interferred with, restrained and coerced its employees by:

> *Surveillance* of the employees' Union activities; *soliciting* employees to pass out anti-Union leaflets, and to remove Union badges; *interrogating* employees concerning their own and other employees' Union activities; *offering* benefits to the employees if they refrained from Union activities; *granting benefits* to the employees; *threatening* employees with changes in working conditions, discharge, the closing of the plant, and other reprisals if they supported the Union, and *coercing* employees engaged in protected Union activities.

2. At all times since the entry of the respective decrees herein, and at all times hereinabove referred to, the Company and Roy Richards, through their officers,

representatives and agents, mentioned above, have in violation of paragraphs (a) and (c) of the Court's decree of April 29, 1963, and paragraphs (a) and (c) of the Court's decree of November 23, 1965, discriminated against employees in order to discourage membership and support of the Union by;

> denying them normal work, assigning them to perform difficult and onerous tasks, issuing warning slips and discharging employees, all on account of their Union activities and sympathies; and in a like and related manner, the Company has otherwise interfered with, restrained and coerced its employees in the exercise of their protected rights.

3. Therefore, the Company and its President have been, are, and continue to be in civil contempt of the Court and the Special Master recommends that they should be so adjudicated and by an appropriate order required to purge themselves by:

(a) Forthwith and in good faith offering to the following named employees immediate and full reinstatement each to his former or substantially equivalent position without prejudice to seniority or other rights and privileges; and by making each whole for all loss of pay due to the discrimination against them, the amount to be fixed by the Board, and approved by further order of the Court:

Glendon E. Griffin	Nellie Green
Christine Brannon	William Davis
Verna Cato	Willie North

(b) Forthwith complying in full with all of the terms and conditions of the aforesaid decrees.

(c) Posting in conspicuous places at respondents' plant in Carrollton, Georgia, including all places where notices to employees are customarily posted, for a period of 60 consecutive days, a notice to be furnished by the National Labor Relations Board, signed by the respondents, which states that they have been adjudicated in civil contempt for disobedience of the Court's decrees, that they will forwith and in good faith, reinstate the above-named employees to their former or substantially equivalent positions at Carrollton, Georgia, and that they will take all of the other action in purgation ordered by the Court, and by maintaining such notices and a copy of the contempt adjudication in clearly legible condition throughout such posting period, taking reasonable precautions that no part thereof is altered, defaced or covered by any other matter.

(d) Filing a sworn statement with the Clerk of the Court and a copy thereof with the Director of the Board's 10th Region, and separately notifying said Director of the 10th Region in writing, within 10 days after the entry of the contempt order, showing what steps have been taken by the Company to comply therewith.

(e) Paying to the Board all costs and expenses, including counsel fees and salaries incurred by the Board in the investigation, preparation and final disposition of these proceedings.

4. It also appears appropriate, and the Special Master

recommends, that the Court should further decree that upon the *failure of* respondents to purge themselves of their contempt, the Court issue attachment against them.

5. It further appears appropriate, and the Special Master recommends, that the Court take such other and further action and grant such other and further relief as may be just, reasonable and necessary to make effective its decrees and as this proceeding in civil contempt may require.

Respectfully submitted,

WILLIAM K. JACKSON
Special Master

Dated at Washington, D. C.
July 9, 1969

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 20008
21784

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

SOUTHWIRE COMPANY AND ROY RICHARDS,
Respondents.

On Petition of the National Labor Relations Board for Adjudication in Civil Contempt

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(July 27, 1970)

Before SIMPSON, MORGAN and INGRAHAM,
Circuit Judges.

SIMPSON, Circuit Judge: Old labor cases never die nor unfortunately do they fade away. This case is no exception.[1]

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[1] See *NLRB v. Southwire Company*, 5 Cir. 1963, 313 F.2d 648; *NLRB v. Southwire Company*, 5 Cir. 1965, 352 F.2d 346; *Southwire Company v. NLRB*, 5 Cir. 1967, 383 F.2d 235; *Southwire Company v. NLRB*, 5 Cir. 1968, 393 F.2d 106.

On May 8, 1968, a Special Master was appointed by this Court to take testimony and receive evidence with respect to the issues raised by the Board's petition which prayed that Southwire Company and Roy Richards, its president, be adjudged in civil contempt for failing to comply with two decrees of this Court, *NLRB v. Southwire Company*, 5 Cir. 1963, 313 F.2d 638, and *NLRB v. Southwire Company*, 5 Cir. 1965, 352 F.2d 346. The Master has made such findings and recommends that Southwire and Richards be adjudged in civil contempt. The Board, in the main, urges that the Master's findings be adopted. We adopt the Master's findings.

The operative portions of this Court's decrees, upon which the present civil contempt proceeding is based, forbid the Company from discouraging membership by unlawfully discharging or discriminating against its employees; unlawfully interrogating its employees; and promising benefits to discourage union support. Succinctly the decrees prohibit the Company from further violation of 8(a)(1) and (3) of the Act.

In the spring of 1967, an organization drive was undertaken by two unions.[2] An election was held which the Unions lost. Alleged unfair labor practices occurred and this contempt proceeding followed.[3] The Master's findings of labor violations by the Company contrary to this Court's prior judgments are at issue.

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[2] International Brotherhood of Electrical Workers, AFL-CIO and the International Union of Electrical, Radio and Machine Workers, AFL-CIO.

[3] The Board made two separate contempt complaints which were consolidated before the Master and this Court because the operative facts arose out of the same 1967 election.

I.

Judicial Notice

Southwire, an embattled and apparently embittered veteran of the union wars, vigorously complains that it was prejudiced by the Master's taking notice of prior proceedings involving Southwire. The Company contends that by taking judicial notice of its deep-seated anti-union animus, the Master effectively altered the degree of proof required in a contempt proceeding; i.e. the evidence must be clear and convincing. Southwire suggests that by taking such notice, the Master made all credibility choices against the Company. The Company thus concludes that the Board's burden was reduced from producing clear and convincing evidence to merely that of substantial evidence.[4]

At a Pre-hearing Conference, attorneys for the Board requested the Special Master to take "official notice" of four cases in which this Court had affirmed Board findings of unfair labor practices by Southwire Company. The Company objected on the ground that such "Notice" would be a deprivation of their constitutional rights since there is a lesser degree of proof required in a Board hearing than in a contempt proceeding. The following colloquy occurred:

> SPECIAL MASTER: ". . . your purpose in using respondents past actions as reflected in these cases is so that I can evaluate the *character of the company* . . . you want me to have

[4] In labor contempt proceedings, the evidence must be clear and convincing. *NLRB* v. *Winn Dixie Stores*, 5 Cir. 1965, 353 F.2d 76; *NLRB* v. *Tupelo Garment Co.*, 5 Cir. 1941, 122 F.2d 603.

> that in the back of my mind as I listen to these witnesses and say, "Well now, these are the company's witnesses and they are not reliable on particular evidence that is being given,' and throw that in the hopper to bring that up or down, if that is your purpose, and I believe that is what it is. As I listen to the testimony I would say, 'Well, don't give that too much weight because you have these two cases that say *they have been in trouble before*'. . . ."

The Special Master denied petitioner's request for official notice, stating:

> "The doctrine of official notice should not be used to alter the degree of proof required in a contempt proceeding".

Despite this ruling the Company claims that the Master did *notice* the prior cases and as a result the Company was denied due process of law through use of a lower standard of proof.

The Special Master stated in his recommended findings of fact:

> "It should be noted here that the unsuccessful efforts of unions to organize Southwire's employees in the past have resulted in prior proceedings in this Court. There can be no question that the Company possesses deepseated anti-union animus not only as recorded in prior proceedings of this Court, but as clearly demonstrated by its vigorous opposition to the 1967 Union organizing campaign as reflected in the

printed matter distributed to its employees. The record of this proceeding as a whole leaves no doubt that the Company, its officers and its supervisory personnel are unalterably opposed to any unionization of Southwire." (Footnote and citations omitted)

The parties on brief vigorously argue the pros and cons of this issue as to whether judicial notice of prior proceedings is proper in a labor contempt case. Resolution of this question is not necessary in these proceedings and we pretermit discussion of the issue. Assuming that it is impermissible to take such notice, we find that the Company has not suffered from application of a lower standard of proof. We find no indication that the Special Master relied on the prior proceedings in any substantial manner to find anti-union animus. Indeed the record read as a whole offers very nearly a text book model of union harassment techniques. We view the Master's language quoted above as a gratuitous observation. There was abundant proof of anti-union animus independent of the prior labor history and the prior decisions. We do not perceive that error was committed in this regard.

II.

Surveillance

In 1964, Southwire hired the Roman Security Agency Inc. to provide security services. Roman placed undercover agents in the plant who masqueraded as ordinary employees. The procedures employed by the agency displayed cloak and dagger techniques worthy of the C.I.A.

The agents recorded all normal company problems.

such as timewaste and thefts in a regular report. Labor activities on the other hand were reported in two ways. One method was to submit written reports to the head agent who would transcribe such notes to a special report. The original notes were always destroyed. The special report was submitted to high company officials. The second method was to record in the regular report the code words "Nothing Special to Report Today". This language signified that a report on labor activities would be submitted orally and no record of the details would be made.

The Company correctly states that not all surveillance is prohibited by the Act; that the only surveillance prohibited is that which interferes with, restrains or coerces union activities. The Company submits that the Master did not make a finding of interference, coercion, or restraint and the surveillance here was not violative of the Act. The Company also argues rather futilely that the purpose of the security program was to spot theft, safety violations and inefficiency and hence that any ancillary or byproduct spying on union activities was *de minimus*. But the record convincingly shows that while union surveillance was not the sole or perhaps even the chief function of Roman, it was by no means *de minimus*.

The Company's basic argument is that since its undercover work was undetected the employees could not have felt coerced by the surveillance. It would be a surprising result if the law were such that an employer could engage in any devious spying technique it desired so long as the program was not detected by employees. Surreptitious surveillance has been disapproved as unlawful surveillance. Cf. *NLRB v. Tidelands Marine*

Service, Inc., 5 Cir. 1964, 339 F.2d 291; *Glenn Rug Co. v. NLRB*, 7 Cir. 1962, 304 F.2d 716, 714-715; *NLRB v. Collins and Aikman Corp.*, 4 Cir. 1944, 146 F.2d 454, 455.

It is true that the Master made no specific finding that a specific employee's rights were interfered with, restrained, or coerced. However it is a reasonable inference that such information received from its agents provided the Company with a knowledge of the union leaders' activities and facilitated the Company's subsequent harsh reprisals.

III.

Unlawful Solicitation

The Master found that the Company unlawfully solicited four employees, Griffin, Daniel, Mashburn and Cooley, to remove union badges. The Company concedes that as to Griffin and Cooley that there was a conflict in the evidence and thus room for opposing inferences to be drawn. As to Daniel and Mashburn, the Company merely makes the bald statement that the findings are not supported by clear and convincing evidence. The Company invokes no specific objection. A reading of the testimony before the Master reveals precisely to the contrary.

IV.

Interrogation

A. *The Poll*

On May 31, 1967, the Union filed a request with the NLRB to proceed with a representation election. On

June 1, 1967, Southwire received a typical union authorization card majority recognition demand. On June 2, 1967, the Company engaged in a poll of its employees. In each instance, the Company official would read from a prepared text.[5]

The Company argues that the Master erred in finding that the poll was in violation of the Act because the Master improperly relied on *Struknes Construction Co.*, 165 NLRB No. 102 (1967). See *N.L.R.B. v. J. M. Machinery Corp.*, 5 Cir. 1969, 410 F.2d 587, 589, n. 30.

[5] The text read:

"STATEMENT

"I have called this meeting today/tonight to discuss something which I consider to be as important to you as it is to Southwire.

"As you can see, I am reading from a prepared text instead of speaking to you off the cuff. The reason for this is to avoid any mistakes or confusion later on as to what I had to say to you here today/tonight.

"For several years, the I.U.E. has attempted to get into our plant. All of their efforts have failed. So now the National Labor Relations Board has announced that will be another election here at Southwire on Friday, June 23rd.

"However, yesterday I received a letter from the lawyer for the union in which he claimed that the I.U.E. represented a majority of you, and he demanded that Southwire automatically recognize the union as your legal representative without ever giving you a chance to vote on this question in a secret-ballot election.

"Now, I personally doubt that this union actually does represent a majority of our employees as the union lawyer claims. However, as a result of this claim Southwire is presently confronted with this question: Do we (1) recognize this union now as your exclusive representative without an election; or do we (2) refuse to recognize the union and leave it up to you to decide this question in a secret-ballot election?

"I am going to put it to a vote of all employees in this plant. However, before I ask for a show of hands from you, let me assure you that no employee will suffer any reprisals or other discrimination as a result of the way he or she votes here today. The sole purpose of this vote is to enable me to answer the union's demand intelligently.

"Now, at this time I ask all of you who want the union to be your representative without a secret-ballot election to hold up your hands. (Count Hands)

"Now, I ask all of you who are undecided and want the question settled by a secret-ballot election, and all of you who do not want a union here at Southwire to raise your hands. (Count Hands)

"Think you very much".

Struksnes sets out five requisites for a poll* one of which is a poll by secret ballot (admittedly not used in the present case). The Company argues that Struksnes was decided after the conducting of the poll here and should not have been applied to the present case.

This Court need not become immersed in the morass of an argument as to retroactivity, assuming that the doctrine has applicability in labor contempt cases. The poll was clearly violative of even pre-Struksnes standards. The poll did not test the correctness of the union's majority claim. It was not designed to discover who favored the union and who opposed it, the basis of the majority claim. Rather the poll, conducted in a stark anti-union atmosphere, first merely sought a show of hands (connected to faces) of those who favored recognizing the union without an election. The unclear choice of the second alternative call for a show of hands is best demonstrated by recopying here for emphasis the language used, with numbers inserted to indicate the various categories called upon to vote in the same way at the same time:

> "Now, I ask all of you (1) who are undecided and (2) want the question settled by a secret-ballot election, and (3) all of you who do not want a union here at Southwire to raise your hands."

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*Under Struksnes, an employer's poll of employees is considered unlawful, absent unusual circumstances, unless:
(1) The purpose of the poll is to determine the truth of a union's claim of majority status;
(2) The employees are told that this is the purpose of the poll;
(3) Assurances against reprisals are given;
(4) The employees are polled by secret ballot;
(5) The employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

In sum, the Master's finding that the poll constituted an unlawful interrogation is supported by clear and convincing evidence.

V.

Wage Increase

Southwire's position is that the wage increase resulted from months of study and planning and was unconnected with any anti-union motive. The increase was proposed to President Richards in November 1966, and was announced on May 5, 1967 and made effective on June 4, 1967 at the height of the organization campaign. Concededly, the increase was in part motivated by legitimate business reasons, but there is sufficient evidence to support the Master's findings that the timing of the raise was designed to achieve optimum anti-union results. The method followed in this instance deviated substantially from prior pay raise procedure.

In its message to the president, the pay raise committee recommended a pay hike of 25¢ per hour to be paid in five increments. The committee also suggested a change in shift hours and better communications between employees and management.

The president adopted the shift hour changes immediately and sat on the pay raise recommendation without action for more than six months. Finally it was decided in early May that the increase was to be 20¢ an hour (10¢ before the election and 10¢ after). The information was related to the foremen in mid-May and they in turn personally informed each of their employees. Normally pay raises were announced by placing the in-

formation on bulletin boards. The office employees who were not involved in the union campaign received only a 10¢ per hour increase in two 5¢ increments. Normally all employees received the same across the board increases. The increase was a flat uniform hourly rate instead of a percentage, as had been given in the past.

The Special Master specially noted that although the wage increase decision was made on May 5, 1967, the announcement to the foreman was delayed until May 16, 1967 and because of the new procedure[1] of personal conveyance of information by the foremen the employees did not begin to learn of the increase until June 4, 1967. The crucial fact to evaluate "is not whether [the Company] would have increased wages at some time or another . . . but whether the increase was granted when it was because of union activities". *NLRB v. Laars Engineers Inc.*, 9 Cir. 1964, 332 F.2d 664, 667. There was an amplitude of clear and convincing evidence upon which the Master could reasonably conclude that the timing of the increase was union motivated.

VI.

The remaining findings sought to be enforced by the Board deal with specific incidents involving specific individuals. Jurisprudence would not be served by prolonging this opinion by describing every incident. After careful review of the record we adopt the Master's findings that the Company threatened employees Tyree, Drummond and Martin; and the findings of discrimination against union activists North, Green, Kelley, Edna

[1] The Company attempted to justify this procedure on the basis that it helped promote labor-management relationship. The Master found this to be pretextual because the practice was abandoned in August 1967 soon after the election.

Griffin, Springer, Glendon Griffin and Brannon. Only the discharge of Mrs. Cato warrants discussion.

The Company knew that Mrs. Cato was the wife of a union supporter. She was a trainee as a buncher machine operator.

Company witnesses testified that Mrs. Cato was continually visited by men from other departments, inattentive, careless, and generally uninterested in her work. As a result she was fired.

The Master noted that neither Cato nor the visiting men were issued warning slips for their conversations. The Master thought it curious that there was disparity in Company policy; another union advocate was fired for exchanging greetings with a fellow worker while Mrs. Cato's visitors were not even warned. Mrs. Cato never received any warning slips for shoddy workmanship. She was fired almost immediately after it became known that she was the wife of a union supporter. Mrs. Cato was fired in violation of written Company policy of requiring an employee to have received four minor warnings before dismissal is justified.

While there is much to support the Company's position that the discharge was legitimate and was unconnected with union problems, we cannot say that the Master as finder of fact erred. The disparity in treatment of similar incidents, coincidence of the discharge with the Company's discovery of Mrs. Cato's marital relationship, and the contravention of established Company firing policy adequately support the Master's Findings.

VII.

The Board's Exceptions

The Board argues that the Master's conclusions that Superintendent Ledford's and President Richards' statements were protected under Section 8(c) of the Act were erroneous as a matter of law.

Ledford advised the employees of possible bloodshed which *could* result from strikes and pickets. Richards informed the employees that if the Union came in he was unsure of the status of the Company, future raises, or of a profit sharing plan.

Section 8(c) of the Act implements the First Amendment by requiring that the expression of "any views, argument, or opinion" shall not be "evidence of an unfair labor practice" so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of Sec. 8(a)(1).

The Board urges that the Master's conclusions were erroneous as a matter of law in light of *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), which was decided shortly before the filing of the Master's Report.* A reading of *Gissel* reveals that the Supreme Court is merely reiterating the common rubric that an employer's predictions are protected by the First Amendment if they are based on fact and if such statements do not tend to coerce or offer benefits to the employees. Cf. *N.L.R.B. v. Brownwood Mfg. Co.*, 5 Cir. 1966, 363 F.2d 136, 138; *N.L.R.B.*

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* The Board suggests that the Master may not have been aware of *Gissel* because *Gissel* was handed down on June 16, 1969 and the Master's Report was filed on July 9, 1969.

v. Transport Clearings, Inc., 5 Cir. 1963, 311 F.2d 519, 524. With deference to the Board, we do not agree with its suggestion that *Gissel* enunciated new law in this respect. Finally it should be noted that the Supreme Court in *Gissel* was reviewing determinations that certain employer statements were coercive while in the instant case we are reviewing an opposite result.

The relationship between predictions and fact and their possible impact upon employees is a question of fact and factual findings should not be overturned unless clearly erroneous (or if unsupported by substantial evidence in the normal NLRB case). We agree with the Master's findings that the statements in question were entitled to First Amendment protection.

The Court is grateful for the thorough report prepared by the Special Master, William K. Jackson, Esquire. His recommended findings of fact and conclusions of law are adopted in their entirety and

ENFORCED.

In conformity with this opinion and under the provisions of Rule 19, Federal Rules of Appellate Procedure, the Board is directed to serve upon the respondents, Southwire Company and Roy Richards, a proposed judgment and order conforming in all respects with the recommended conclusions and order set forth at pages 219-223 of the Report of the Special Master herein.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 20,008 and 21,784

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

SOUTHWIRE COMPANY AND ROY RICHARDS,
Respondents.

JUDGMENT IN CONTEMPT

Before: Simpson, Morgan and Ingraham, Circuit Judges:

This cause came on to be heard upon the petition of the National Labor Relations Board to adjudge Southwire Company, and Roy Richards, its president, in civil contempt for failing to comply with two decrees of this Court entered against Southwire Company on April 29, 1963 and November 23, 1965, respectively. On July 9, 1969, the Special Master issued his report recommending that the Company and its president be adjudged in civil contempt of the said decrees and that they be required to purge themselves as set forth at pages 219-223 of his report. The Master also absolved respondents from some of the allegations set forth in the Board's petition. On March 16, 1970, the Court heard oral argument on exceptions filed by the parties, and on July 27, 1970, issued its decision approving and confirming the Master's report in all respects. In conformity therewith, it is hereby

ORDERED AND ADJUDGED that Southwire Company and its president, Roy Richards, are in civil contempt of this Court for violating and disobeying the Court's decrees of April 29, 1963 and November 23, 1965, and they shall purge themselves of said contempt by:

(a) Forthwith and in good faith offering to the employees named below immediate and full reinstatement each to his former or substantially equivalent position without prejudice to seniority or other rights and privileges, and by making each whole for all loss of pay due to the discrimination against them, the amount to be fixed by the Board in regularly constituted backpay proceedings, and approved by further order of the Court:

Glendon E. Griffin	**Nellie Green**
Christine Brannon	**William Davis**
Verna Cato	**Willie North**

(b) Forthwith complying in full with all of the terms and conditions of the aforesaid decrees.

(c) Posting in conspicuous places at respondents' plant in Carrollton, Georgia, including all places where notices to employees are customarily posted, for a period of 60 consecutive days, a notice in the form to be furnished by the National Labor Relations Board, signed by the respondents, which states that they have been adjudicated in civil contempt for disobedience of the Court's decrees, that they will forthwith and in good faith, reinstate positions at Carrollton, Georgia, and that they will take all of the other action in purgation ordered by the Court, and by maintaining such notices and a

copy of this contempt adjudication in clearly legible condition throughout such posting period, taking reasonable precautions that no part thereof is altered, defaced or covered by any other matter.

(d) Filing a sworn statement with the Clerk of the Court and a copy thereof with the Director of he Board's 10th Region, and separately notifying said Director of the 10th Region in writing, within 10 days after the entry of the contempt order, showing what steps have been taken by the Company to comply herewith.

"(e) Paying to the Board that pro rata percentage of costs and expenses, including counsel fees and salaries incurred by the Board in the investigation, preparation and final disposition of these proceedings, as the allegations resolved against Respondents bear to the total number of allegations initially prosecuted against them, said amount to be fixed by further order of the Court upon submission by the Board of a verified schedule of such costs and expenses."

It is FURTHER ORDERED AND ADJUDGED that upon the failure of respondents to purge themseves of their contempt as herein ordered by the Court issue attachment against respondents and any other officer responsible therefor, and will take such other and further action as it may deem appropriate.

Entered: August 26, 1970

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 20,008 and 21,784

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

SOUTHWIRE COMPANY,
and
ROY RICHARDS,
Respondents.

On Petition of the National Labor Relations Board for Adjudication in Civil Contempt

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion July 27, 1970, 5 Cir., 1970 ..... F.2d .....).

(October 28, 1970)

Before SIMPSON, MORGAN and INGRAHAM, Circuit Judges.

PER CURIAM: The Petition for Rehearing is

DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Supreme Court, U.S.
FILED
DEC 7 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1063

SOUTHWIRE COMPANY and ROY RICHARDS,
Petitioners

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Frank M. Swift
2000 Atlanta Gas Light Tower
235 Peachtree Street, N. E.
Atlanta, Georgia 30303
Attorney for Petitioners

Of Counsel:
SWIFT, CURRIE, McGHEE & HIERS
2000 Atlanta Gas Light Tower
235 Peachtree Street, N. E.
Atlanta, Georgia 30303

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Presented For Review	2
Constitutional Provision Involved	2
Statement Of The Case	2
Reasons For Granting The Writ	6
Conclusion	11

TABLE OF AUTHORITIES

CASES:	Page
Consolidated Edison Co. vs. National Labor Relations Board, 305 US 197 (1938)	6
Re Green, 369 US 689 (1962)	10
Hart, Schaffner & Marx vs. Alexander's Department Stores, Inc., 341 F2d 101 (2d Cir., 1965)	7
Kansas City Power & Light Company vs. NLRB, 137 F2d 77 (8th Cir., 1943)	7
Maggio vs. Zeitz, 333 US 56 (1948)	10
National Labor Relations Board vs. Columbian Enameling and Stamp Co., 306 US 292 (1939)	6
NLRB vs. Southwire Company, 133 NLRB 83, enfc'd 313 F2d 638 (5th Cir., 1963)	3
NLRB vs. Southwire Company, 143 NLRB 1329, enfc'd 352 F2d 346 (5th Cir., 1965)	3
NLRB vs. Tupelo Garment Co., 122 F2d 603 (5th Cir., 1941)	7
Re Oliver, 333 US 257 (1948)	10
Oriel vs. Russell, 278 US 358 (1929)	7
Southwire Company vs. NLRB, 159 NLRB 394, enfc'd in part 383 F2d 235 (5th Cir., 1967)	3

TABLE OF AUTHORITIES (Continued)

CASES: Page

Southwire Company vs. NLRB, 164 NLRB 135, enfc'd 393 F2d 106 (5th Cir., 1968) 3

Stringfellow vs. Haines, 390 F2d 910 (2d Cir., 1962) 7

Telling vs. Bellows-Claude Neon Company, 77 F2d 584 (6th Cir., 1935) cert. denied 296 US 594 (1935) 6

Universal Camera Corp. vs. National Labor Relations Board, 340 US 474 (1951) 6

Washington vs. Central of Georgia Railway Co., 174 F. Supp. 33 (M.D., Ga., 1958), aff'd 268 F2d 445 (5th Cir., 1959), cert. denied 361 US 943 (1960) 6

CONSTITUTIONAL PROVISION:

U. S. Const. amend. V 2

STATUTE:

Labor-Management Relations Act, Section 10(e) 29 U.S.C. §160 (e) 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. _____

SOUTHWIRE COMPANY and ROY RICHARDS,
Petitioners

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Southwire Company and Roy Richards, petition for a writ of certiorari to issue to review the decision in this case, published July 27, 1970, and the judgment entered August 26, 1970, adjudging Petitioners in civil contempt, on which rehearing was denied October 28, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in the Appendix to this Petition, pages 53-66, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was dated and entered August 26, 1970. (App., pp. 67-69).[1] Rehearing and rehearing en banc was denied by the Court of Appeals on October 28, 1970. (App., pp. 70-71). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether a Special Master, appointed to hear evidence in a contempt proceeding before the Court of Appeals, may take judicial notice of prior judicial decisions based on lesser degrees of proof, and use those decisions to establish an element necessary to adjudge a Respondent in contempt.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the due process guarantee contained in the Fifth Amendment to the United States Constitution, the pertinent portion of which reads:

> "No person shall be . . . deprived of life, liberty, or property without due process of law . . ." U.S. Const. amend. V.

STATEMENT OF THE CASE

This action was initiated on December 27, 1967, when the National Labor Relations Board (hereinafter referred

[1] Page references to the separate Appendix to this Petition are designated by the abbreviation "App."

to as the "Board) petitioned the Fifth Circuit Court of Appeals to adjudge Southwire Company and its president, Roy Richards (hereinafter referred to as "Petitioners"), in civil contempt. The Board alleged forty-seven (47) violations by Petitioners of two earlier decrees by the Fifth Circuit Court of Appeals. (App., p. 45). Those earlier decrees had forbidden Southwire Company from discouraging union membership by unlawful interrogation, threats, or discrimination against its employees, or in any other manner interfering, restraining, or coercing its employees in their right to organize for collective bargaining. (App., pp. 38-39). The Court of Appeals, after Petitioners answered denying the allegations contained in the Board's petition, referred the matter to a Special Master to determine the issues of fact and law raised by the respective pleadings. (App., pp. 1-5).

The Special Master held a prehearing conference on June 7, 1968, at which Petitioners and the Board were represented by counsel. At that conference, counsel for the Board requested the Special Master take "official notice" of four reported cases previously decided by the Fifth Circuit Court of Appeals and involving Petitioner Southwire Company. (App., p. 14)[2] The four cases desired noticed were *NLRB vs. Southwire Company*, 133 NLRB 83, enfc'd 313 F2d 638 (5th Cir., 1963); *NLRB vs. Southwire Company*, 143 NLRB 1329, enfc'd 352 F2d 346 (5th Cir., 1965); *Southwire Company vs. NLRB*, 159 NLRB 394, enfc'd in part 383 F2d 235 (5th Cir., 1967); and *Southwire Company vs. NLRB*, 164 NLRB 135, enfc'd 393 F2d 106 (5th Cir., 1968). The first two decisions con-

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[2] The Appendix reference here is to a portion of the Official Transcript of the prehearing conference of June 7, 1968. This transcript is a part of the certified record in this case, but for the Court's convenience, the pertinent portions of the transcript are set forth in the Appendix to this Petition.

tained the decrees which Petitioners were alleged to have violated in this proceeding. The latter two decisions were unconnected with this case, but admittedly involved unfair labor practice violations on the part of Petitioner Southwire Company.

Specifically, the Board sought to have official or judicial notice taken of each of those proceedings in order that the Special Master might consider, in this case, the Company's anti-union animus as indicated by the unfair labor practice findings of the four prior cases. (App., p. 15). This procedure was objected to at the time by counsel for Petitioners. (App., pp. 14, 16, 20) The Special Master delayed ruling on this question but stated, "if I rule I am not taking official notice you can be quite sure that as a skilled trier of facts . . . I will not." (App., p. 23).

By his Order of September 24, 1968, the Special Master after due consideration denied the Board's request for "official notice". (App., pp. 24-29). The Board moved for reconsideration of the Special Master's Order, and again on October 4, 1968, the Special Master denied that request. (App., pp. 30-33). From October 7 through October 15, 1968, and from November 11 through November 21, 1968, the Special Master then conducted the hearing on the evidence. (App., p. 37).[3]

On July 9, 1969, the Special Master issued a Report on his findings and recommended Petitioners be adjudged in civil contempt. (App., pp. 34-52). Contrary to his Orders and oral assurances the Special Master cited each

[3] The Appendix reference here is to the Report of the Special Master filed with the Court of Appeals, and which is a part of the certified record in this case. For the Court's convenience, however, the pertinent portions of the Special Master's Report are set out in the separate Appendix to this Petition.

of the four previous reported decisions at the outset of his Report in partial support of the proposition: "There can be no question that the Company possesses deep-seated anti-union animus . . ." (App., p. 44). The Special Master then proceeded to discuss each of the various allegations of contemptuous acts and made specific mention of his reliance upon the judicially noticed material on *eleven* separate occasions in his Report.

Petitioners objected before the Court of Appeals to the entire 223-page Report of the Special Master upon dual grounds: (1) it was erroneous in the first instance for the Special Master to take such judicial notice, and (2) it was erroneous under the circumstances, because of Petitioner's reliance induced by the Orders and oral assurances of the Special Master.

The Court of Appeals, in its review of the Special Master's Report, adopted his findings of fact and conclusions of law in their entirety. (App., p. 66). The Court avoided resolving the question of propriety of taking judicial notice raised by Petitioners. The Court's decision simply stated there was no indication that the Special Master relied on the prior proceedings in any substantial manner to find anti-union animus. (App., p. 57).

The basis for Federal jurisdiction in the court of first instance, the United States Court of Appeals for the Fifth Circuit, was the Labor-Management Relations Act, Section 10(e), 29 U.S.C. § 160(e), granting the National Labor Relations Board the power to petition the United States Court of Appeals, for the circuit wherein the unfair labor practice in question occurred, for enforcement of its order.

REASONS FOR GRANTING THE WRIT

This case involves a question of the basic and fundamental fairness which should be accorded all litigants. Petitioners here have been denied that fundamental fairness.

It is clear that two separate and distinctly different degrees of proof are necessary to carry the proponent's burden in an administrative hearing before the Board and a contempt proceeding before a Court of Appeals. In an evidentiary proceeding before the Board a proponent need only prove his case by a "preponderance" of the evidence. "Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion", has been held sufficient to support a finding for the proponent. *Consolidated Edison Co. v. National Labor Relations Board*, 305 US 197, 229 (1938); *National Labor Relations Board vs. Columbian Enameling & Stamp Co.*, 306 US 292, 300 (1939). So long as that finding is supported by substantial evidence on the record as a whole it will then stand review by a Court of Appeals. *Universal Camera Corp. vs. National Labor Relations Board*, 340 US 474 (1951). The four previous decisions of which the Board requested the Special Master to take official notice were court reviews of Board proceedings.

In a contempt proceeding a bare "preponderance" of the evidence will *not* suffice to show a Respondent in contempt. Acts alleged to be in civil contempt of court decrees must be established by "clear and convincing evidence". *Washington vs. Central of Georgia Railway Co.*, 174 F.Supp. 33 (M.D., Ga., 1958), aff'd, 268 F2d 445 (5th Cir. 1959), cert. denied 361 US 943 (1960); *Telling vs.*

Bellows-Claude Neon Company, 77 F2d 584 (6th Cir. 1935), cert. denied 296 US 594 (1935); Cf. *Oriel vs. Russell*, 278 US 358, 362-363 (1929). The circuit courts are in accord that a heavy burden of proof rests upon the party urging contempt. *NLRB vs. Tupelo Garment Co.*, 122 F2d 603 (5th Cir. 1941); *Hart, Schaffner & Marx vs. Alexander's Department Stores, Inc.*, 341 F2d 101, 102 (2d Cir., 1965); *Stringfellow vs. Haines*, 309 F2d 910, 912 (2d Cir., 1962); *Kansas City Power & Light Company vs. NLRB*, 137 F2d 77, 79 (8th Cir., 1943).

The burden of proving Petitioners in contempt was upon the Board at the hearing before the Special Master. *Washington v. Central of Georgia Railway Co.*, 174 F.Supp. at 37. The Board had the burden of showing—not by a mere preponderance of the evidence—but by clear and convincing evidence that Petitioners had committed contemptuous acts. The element of "anti-union animus" is strong medicine before the Board, and routinely, Board counsel injects this factor into an administrative hearing by moving the Trial Examiner to "officially notice" previous violations by an employer. Official notice by an administrative hearing officer would not involve different degrees of proof. In this case, however, the effect of the Board's motion[4] was to reduce its burden of proof in a judicial contempt proceeding by establishing "anti-union animus" from previous findings which

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[4] It is clear from the remarks of the Board's counsel at the pre-hearing conference what the Board intended to have officially noticed in those four prior proceedings. As the Board attorney explained:

> "[Taking official notice] would include the facts found by the Board and proved by the Court in those cases and the statements made therein." (App. p. 15).

The Board's reason for requesting "official notice" is also apparent:

> "We believe the history of this Company makes it clear and will aid [the Special Master] in deciding the motivation for many of the actions that we allege are . . . violative of the Court decree and put the Company in contempt." (App., p. 19).

were based on a degree of proof less than "clear and convincing."

Petitioners at the pre-hearing conference objected to this procedure on the basis that it would reduce the degree of proof required of a portion of the Board's case. (App., p. 20).

The Special Master in this Order of September 24 *denying* the Board's request for official notice recognized:

> "[The Board], in seeking to invoke the doctrine of Official Notice, is *attempting to establish critical facts in a contempt proceeding which were established in earlier administrative proceedings under the 'substantial evidence' rule.* The doctrine of official notice should not be used to alter the degree of proof required in a contempt proceeding." (App., p. 28). (Emphasis supplied)

On October 4 the Special Master denied a Motion for Reconsideration of his Order of September 24. (App., p. 30). At the pre-hearing conference the Special Master had assured Petitioners that if he ruled against taking judicial or official notice then he would *not* do so. (App., p. 23). Thus, Petitioners approached the hearing before the Special Master secure in the understanding that they would not be faced, as the Special Master had earlier characterized it," . . . with an almost impossible task . . . [of being] prepared to rebut all the evidence in the noticed earlier cases or suffer the consequences." (App., p. 25).

In his decision, however, the Special Master reneged on his oral assurances, repudiated his prior orders, and effectively took judicial notice of *all four prior proceedings*. He set out in writing upon the face of the record the four prior cases and cited them in partial support of proposition, "There can be no question that the Company possesses deep-seated anti-union animus . . ." App., p. 44).

The Special Master then proceeded to judge Petitioners, their statements, their acts, and the credibility of their witnesses in light of this "deep-seated anti-union animus." He commented time and again upon Petitioners' "anti-union animus", "unlawful hostility", "general hostile attitude", "long history of opposition to unionization", "anti-union bias and demonstrated unlawful hostility" as factors upon which to base his decisions on various allegations against Petitioners. (App., pp. 46-49).

By so doing the Special Master effectively reduced the Board's burden by altering the quantum of proof required from clear and convincing evidence to that lesser degree of proof required to sustain the findings in the previous administrative proceedings.

By so doing the Special Master presented Petitioners with the impossible task of rebutting all the evidence against them in the four previous cases.

By so doing, after assuring Petitioners he would *not* take judicial notice of the prior proceedings, the Special Master denied Petitioners the right to have presented their case in a different manner.

Neither does the subsequent review by the Court of Appeals remove the taint of prejudice with which the Special Master's findings are tinged. The Court below simply avoided the issued by ". . . find[ing] no indication" that the Special Master relied on the prior proceedings in any "substantial" manner. Petitioners submit that the Court of Appeals was not situated so as to be able to reach that conclusion. The record in this case is replete with indications that the Special Master *did* consider the previous unfair labor practice decisions. The Court of Appeals cannot speculate in hindsight on the *extent* to which the prior "convictions" of Petitioners subjectively influenced the Special Master in his deliberations.

The fact remains that the previous decisions *were* considered after Petitioners were assured they would *not* be considered. Such an absolute denial of fundamental fairness in a judicial proceeding cannot be remedied by the lower court's finding that the inequity was not "substantial".

This Court has admonished that procedural due process requires that one charged with contempt of court be advised of the charges against him and have a *reasonable opportunity* to meet them by way of defense or explanation. *Re Oliver*, 333 US 257, 275 (1948); *Re Green*, 369 US 689, 691 (1962). Nor is the concept new to this Court that substitution of a finding from a proceeding requiring a lesser degree of proof can unfairly alter the measure of proof in a later proceeding. *Maggio vs. Zeitz*, 333 US 56, 78-81 (1948) (separate opinion).

The procedure used in this case by the Special Master and sanctioned by the court below hardly comports with

the requirements of due process of law guaranteed to Petitioners. Moreover it represents a dangerous intrusion of administrative procedural policy (based on expediency and administrative expertise) upon the judicial process. By its sanction of such a procedure the Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their Petition For A Writ of Certiorari be granted.

Respectfully submitted,

Frank M. Swift
2000 Gas Light Tower
Peachtree Center
Atlanta, Georgia 30303

Of Counsel Swift, Currie, McGhee & Heirs
2000 Gas Light Tower
Peachtree Center
Atlanta, Georgia 30303

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1063

SOUTHWIRE COMPANY AND ROY RICHARDS, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. In December 1967, the Board filed a petition in the court of appeals asking that petitioners be adjudged in civil contempt for failing to comply with two decrees of that court (*National Labor Relations Board* v. *Southwire Company*, 313 F. 2d 638, *National Labor Relations Board* v. *Southwire Company*, 352 F. 2d 346) which prohibited the Company from discouraging union membership by discharging or otherwise discriminating against its employees; coercively interrogating them respecting their union activity; threatening employees with reprisals or promising them benefits to discourage union affiliation or sup-

413-127—70

port; maintaining or enforcing an overly broad no-solicitation rule; and "in any other manner" interfering with, restraining or coercing the employees in the exercise of their rights under Section 7 of the Act. In July 1969, a Special Master, appointed by the court of appeals, filed his report concluding that petitioners had violated the court's decrees by: "*Surveillance* of the employees' Union activities; *Soliciting* employees to pass out anti-Union leaflets and to remove Union badges; *Interrogating* employees concerning their own and other employees' Union activities; *Offering benefits* to the employees if they refrained from Union activities; *Granting benefits* to the employees; *Threatening* employees with changes in working conditions, discharge, the closing of the plant, and other reprisals if they supported the Union; and *Coercing* employees engaged in protected Union activities" (Pet. App. 49, Rep. 219–220).[1] The Master further found that petitioners had violated the decrees by "discriminat[ing] against employees * * * by denying them normal work, assigning them to perform difficult and onerous tasks, issuing warning slips and discharging employees, all on account of their Union activities and sympathies" (Pet. App. 49–50, Rep. 220–221). The Master recommended that petitioners be found in civil contempt and ordered to comply in full with the court's decrees, reinstate the discharged employees, and post appropriate notices (Pet. App. 50–52, Rep. 221–223). The court of appeals adopted the Master's

[1] "Rep." references are to the full report of the Special Master, excerpts from which are set forth at Pet. App. 34–52.

findings, conclusions and recommended order (Pet. App. 66, 67-69).

2. The sole issue raised by petitioners is whether the contempt adjudication should be set aside because the Special Master impermissibly took official notice of prior judicial decisions involving the Company, and used those decisions "to establish an element necessary to adjudge [petitioners] in contempt" (Pet. 2). That issue is not presented here. While the Master alluded to the earlier cases in his report,[2] he based his findings on "the record of this proceeding as a whole." As the court of appeals stated, in rejecting petitioners' contention (Pet. App. 57):

> [W]e find no indication that the Special Master relied on the prior proceedings in any substantial manner to find anti-union animus. Indeed the record read as a whole offers very nearly a text book model of union harassment techniques. We view the Master's language [n. 2, *supra*] as a gratuitous observation. There was abundant

[2] The Master stated (Pet. App. 11):

> It should be noted here that the unsuccessful efforts of unions to organize Southwire's employees in the past have resulted in prior proceedings in this Court. See *N.L.R.B. v. Southwire Co.*, 313 F. 2d 638 (C.A. 5, 1963); *N.L.R.B. v. Southwire Co.*, 359 F. 2d 346 (C.A. 5, 1965); *Southwire Co. v. N.L.R.B.*, 383 F. 2d 923 (C.A. 5, 1967); *Southwire Co. v. N.L.R.B.*, 392 F. 2d 166 (C.A. 5, 1968). There can be [no] question that the Company possesses deep seated anti-union animus not only as recorded in prior proceedings of this Court, but as clearly demonstrated by its vigorous opposition to the 1967 Union organizing campaign as reflected in the printed matter distributed to its employees. *The record of this proceeding as a whole* leaves no doubt that the Company, its officers and its supervisory personnel are unalterably opposed to any unionization of Southwire. [Emphasis added.]

proof of anti-union animus independent of the prior labor history and the prior decisions. We do not perceive that error was committed in this regard.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

JANUARY 1971.

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